1980

Connie Ray Lund v. Ralph B. Foley : Brief of Respondent

Utah Supreme Court

RICHARD CAMPBELL; Attorney for Defendant-RespondentGARY A. FRANK; Attorney for Plaintiff-Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

* * * * * * *

CONNIE RAY LUND,)

Plaintiff-Appellant,)

vs.) CASE NO. 16921

RALPH B. FOLEY,)

Defendant-Respondent.)

* * * * * * *

APPEAL FROM THE ORDER OF DISMISSAL
OF THE SECOND JUDICIAL DISTRICT
COURT IN AND FOR WEBER COUNTY, UTAH
HONORABLE JOHN F. WAHLQUIST, JUDGE

* * * * * * *

BRIEF OF RESPONDENT

* * * * * * *

RICHARD CAMPBELL
2650 Washington Boulevard
Suite 101
Ogden, Utah 84401
Attorney for Defendant-Respondent

GARY A. FRANK
5085 South State Street
Murray, Utah 84107
Attorney for Plaintiff-Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

* * * * * * *

CONNIE RAY LUND,)

Plaintiff-Appellant,)

vs.) CASE NO. 16921

RALPH B. FOLEY,)

Defendant-Respondent.)

* * * * * * *

APPEAL FROM THE ORDER OF DISMISSAL
OF THE SECOND JUDICIAL DISTRICT
COURT IN AND FOR WEBER COUNTY, UTAH
HONORABLE JOHN F. WAHLQUIST, JUDGE

* * * * * * *

BRIEF OF RESPONDENT

* * * * * * *

RICHARD CAMPBELL
2650 Washington Boulevard
Suite 101
Ogden, Utah 84401
Attorney for Defendant-Respondent

GARY A. FRANK
5085 South State Street
Murray, Utah 84107
Attorney for Plaintiff-Appellant

TABLE OF CONTENTS

AUTHORITIES CITED

CASES CITED

IN THE SUPREME COURT

OF THE STATE OF UTAH

* * * * * * *

CONNIE RAY LUND,)

Plaintiff-Appellant,)

vs.) CASE NO. 16921

RALPH B. FOLEY,)

Defendant-Respondent.)

* * * * * * *

BRIEF OF RESPONDENT

* * * * * * *

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the Order of Dismissal granted by the Honorable John F. Wahlquist, Judge of the Second Judicial District Court in and for Weber County, State of Utah, and entered in the above entitled matter on the 22nd day of January, 1980.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Order of Dismissal and a remand to the lower court for a full trial on the merits or, in the alternative, for a reversal of the Order of Dismissal to the extent the same dismisses Appellant's Complaint with prejudice so that Appellant may refile Appellant's cause of action pursuant to the provisions of Section 78-12-40 Utah Code Annotated (1953, as amended).

STATEMENT OF FACTS

The origin of this case occurred in November of 1971 when Plaintiff cut herself by falling through a storm glass door at her home. Defendant, a general surgeon in Ogden, was summoned to the emergency room and treated her there by examination, removal of glass fragments and suturing (R-12). He had never previously seen her as a patient and saw her on four occasions at the office until January 28th of 1972. He never heard from her again until January of 1977 when he received a telephone call complaining that there were still glass fragments in the area of her ribs and that they were to be removed surgically (R-12).

Notice of intention to commence the action was served upon Defendant October 3, 1977 and this suit was filed December 20, 1978 (R-1, R-13).

Depositions of both Plaintiff and Defendant were taken March 30, 1979, and jury trial was then set for November 15, 1979. Upon stipulation of counsel, the trial was continued from November 15, 1979 (R-29) to January 22, 1980. The case was set for jury trial (R-28) and the jury was waived by the Defendant only the day before trial, after being advised that Plaintiff would not be present.

The day before trial, January 21, 1980, Plaintiff's counsel called defense counsel regarding a continuance and then both counsel spoke by conference call with Judge Wahlquist.

At that time, Plaintiff's counsel advised the Court of the reasons for the request of the continuance and defense counsel advised the Court of opposition to it. The Court denied the request and stated trial would start the next morning.

On the day set for trial, Plaintiff's counsel appeared without his client and defense counsel appeared with his client. The motion for continuance was renewed, argued and denied, and the order of dismissal with prejudice entered (R-33).

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR A CONTINUANCE.

The rules governing granting or denial of continuance are basically 40(b) Utah R. Civ. P. and Rule 4.3(a) of the District Court Rules of Procedure. For convenience, these are set out in full as follows:

> "(b) Postponement of the Trial. Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground." (Emphasis added).

> "Rule 4.3 Continuances-Civil-(a) Cases set for trial shall not be continued upon stipulation of counsel alone, but continuances may be allowed by order of the Presiding Judge or the Judge to whom the case is assigned for trial. No continuances shall be allowed except for good cause shown. Said continuances may be granted upon motion of counsel made in open court or by written stipulation of the parties and approval of the court. A notice of all written motions must be served upon counsel for the opposing side in the manner prescribed by the Utah Rules of Civil Procedure and these rules. In the event that counsel seeks to have the hearing of the same in less than five (5) days from the time of the service of the motion, an order permitting the same and directing that the notice be served, must be entered by the court and served upon counsel with the motion." (Emphasis added).

Fundamental in the rules is that good cause must be shown and that the matter is in the discretion of the trial court.

There is no hard and fast standard by which this is measured and the trial court must indeed be granted considerable latitude in making its determination. 17 Am.Jur2d Continuance §3 Page 120 states the rule as follows:

> "But in the absence of such a statutory provision or such a statutory construction, the rule is universally recognized that the granting or refusal of a continuance rests in the discretion of the court to which the application is made, and its ruling thereon, in the absence of an abuse of discretion, will be upheld on review."

The absence of a party may under certain circumstances be grounds for granting of a continuance. However, a clear showing of good faith and diligence is required therefor, and a party seeking such a delay cannot subordinate the business of the court to his own interests or convenience. See 17 Am.Jur.2d

Continuance §17.

Three Utah cases deal with continuance. Bairas v. Johnson, 373 P.2d 375, 13 Utah2d 269 is the first. In that case, a continuance was requested based upon the affidavit (unchallenged) of Plaintiff's attending physician in California. The affidavit stated the Plaintiff's physical condition was not such that he could travel to attend the trial and that he would in fact be undergoing serious surgey during the week the trial was scheduled. Clearly in Bairas, Plaintiff was unarguably unable to attend and this was due to matters outside his control. There is a clear distinction between Bairas and the present case.

Maxfield v. Fishler, 538 P.2d 1323 (1975) involved a motion for a continuance on the morning of trial. The court, in its discretion, denied the motion and dismissed the case with prejudice. No abuse of discretion was found in the matter in that no justification for the continuance was shown as required by Rule 40(b).

First Security Bank v. Johnson, Utah 1975, 540 P.2d 521 also affirmed a denial of a continuance. The motion apparently was predicated on two bases.

(1) The trial date would jeopardize Plaintiff's job, and,

(2) Plaintiff was in other conflicting federal litigation.

The denial of the continuance was unanimously confirmed by this court.

Applying the basic law to our case, we find that jury trial was noticed in November of 1979 for hearing on January 22, 1980. The day before trial, Plaintiff's counsel requested a stipulation for a continuance which was denied by by defense counsel. That same day a telephone conference call with the judge took place in which counsel stated the grounds of the request for a continuance and the court denied the telephone motion.

Upon being advised that Plaintiff would not in fact be there, Defendant then waived the jury and the case came on for a non-jury trial the morning of January 22, 1980 in Ogden before the Honorable John F. Wahlquist.

At that time, Plaintiff's counsel renewed the motion for a continuance. Defendant was present with his client, Dr. Ralph Foley (R-37). The position advanced is reflected in the record at R-38, Lines 4 through 13:

> "MR. FRANK: That's correct, your Honor. It's her opinion that she has to remain in Las Vegas to appear as a witness before this administrative agency in their investigation of her friend. That is the sole basis she's given me for her nonappearance today.
>
> THE COURT: You don't even know what day she is going to be a witness or anything of this sort?
>
> MR. FRANK: I think it's sometime during this week, your Honor, but other than that, I'm not in a position to represent a specific date to the Court."

This motion for continuance was then denied by the court and an order thereupon entered the same day dismissing Plaintiff's complaint with prejudice (R-32).

At most, Plaintiff's showing is that for her own reasons and purposes, she decided to put the importance of an administrative hearing in Nevada ahead of the scheduled trial of her own lawsuit in District Court in Utah. There is no showing or even representation that she was required to attend such hearing, but just that she wanted to in order to help her friend.

We have serious doubts that even a showing of being subpoenaed in another forum through an administrative agency action would take precedent over the District Court of Weber County, a court of general jurisdiction which had scheduled two days well in advance for the trial of this lawsuit.

Clearly it was not an abuse of discretion for Judge Wahlquist to deny the request on the limited showing made by Plaintiff. The court had scheduled its facilities for two days, summoned (and then dismissed) a jury, Defendant had scheduled two days out of his practice for the trial of this lawsuit, and Defendant's counsel had likewise scheduled two days for the exclusive purpose of trying the lawsuit.

To allow the court's schedule to be disrupted just by Plaintiff's intentional decision to support a friend in an unnamed proceeding of some type would be unconscionable.

Certainly an administrative hearing of some type could change the order of witnesses appearing to accommodate Plaintiff's being in Utah two days during the week the hearing was to be made. Apparently no effort was made to accomplish this and the only effort made was placed upon Plaintiff's counsel who was put in the position of having to seek a continuance without any real justification for it.

POINT II.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN GRANTING A DISMISSAL WITH PREJUDICE.

Plaintiff concedes that it is within the discretion of the court in a situation like this to enter such a dismissal with prejudice. See Appellant's brief, Page 8. Here the case was regularly called for trial after denial of the motion for continuance, Plaintiff had no evidence whatsoever to present, and accordingly, the decision should have been and was on the merits.

It would have done Defendant little good if the dismissal had been without prejudice and Plaintiff had been allowed under the tolling section of the limitations statute to refile her case within one year after the dismissal. That would just mean that instead of having his trial in January of 1980, he might be faced with a trial in 1981 or 82 arising out of the same circumstances.

If such were the case, in order to get the matter finally resolved, Defendant probably would be better off if

the continuance had been granted and trial set for the following month.

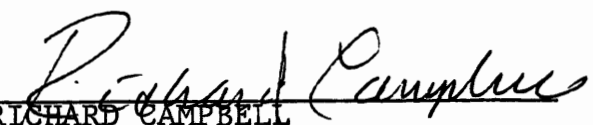
Clearly it was in the interest of justice when Plaintiff did not proceed with trial at the appointed time and presented no evidence or witnesses, for Defendant to be granted relief in the form of a final judgment of dismissal with prejudice.

CONCLUSION

The order and actions of the trial court, both in denying the continuance and in entering a dismissal with prejudice are clearly supported by the record. The trial courts must have control of their own calendars. There was no good cause shown in this case and indeed a total lack of any real cause for the nonappearance of the Plaintiff at the appointed time of trial. Since she chose voluntarily not to appear, Defendant was entitled to his day in court and to the action the trial court took. The decision should be affirmed in all respects.

DATED this 11 day of July, 1980.

Respectfully Submitted,



RICHARD CAMPBELL
Attorney for Defendant-Respondent
2650 Washington Boulevard
Suite 101
Ogden, Utah 84401